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Nos. 94-929, 94-631, and 94-797

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In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, APPELLANT

v.

DAVIDA JOHNSON, ET AL.

ZELL MILLER, ET AL., APPELLANTS

v.

DAVIDA JOHNSON, ET AL.

LUCIOUS ABRAMS, JR., ET AL., APPELLANTS

v.

DAVIDA JOHNSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a districting plan is always subject to strict scrutiny if race has been a substantial or motivating factor in its creation.

2. Whether the boundaries of Georgia's Eleventh Congressional District are so bizarre on their face that they can be understood only as an effort to segregate voters into separate districts because of their race.

3. Whether the State's creation of District Eleven is narrowly tailored to further a compelling interest.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the plaintiffs below were Pam Burke, Henry Zittrouer, George L. DeLoach, and George Seaton. The defendants below were Zell Miller, Governor of Georgia, Pierre Howard, Lieutenant Governor of Georgia, Thomas Murphy, Speaker of the House of Representatives of Georgia, and Max Cleland, Secretary of the State of Georgia. Intervenor-defendants were Lucious Abrams, Jr., Rev. G.L. Avery, William Gary Chambers, Sr., and Karen Watson.

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OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-102a)[1] is reported at 864 F. Supp. 1354.

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[1] "J.S. App." refers to the appendix to the United States' Jurisdictional Statement.

JURISDICTION

The judgment of the three-judge court was entered on September 12, 1994. The United States filed a notice of appeal on September 20, 1994 (J.S. App. 105a-106a), and an amended notice of appeal on September 22, 1994 (J.S. App. 107a-108a).[2] The jurisdiction of this Court rests on 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment provides that "[N]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws." Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. 1973, 1973c, are reproduced at App., *infra*, 1a-3a.

STATEMENT

This case concerns a constitutional challenge to the configuration of the Eleventh District in Georgia's 1992 congressional redistricting plan. A three-judge district court held that the Eleventh District violates the Fourteenth Amendment under standards set forth in *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993). The United States, three of the four defendant state officials, and the private defendant-intervenors (Abrams defendants) have appealed from that judgment.

1. The population of the State of Georgia is approximately 27% African-American. J.S. App. 68a. Georgia has an extensive history of discrimination in voting. The district court took judicial notice of the fact that, "[f]rom the state's first Constitution—which barred blacks from voting altogether—through recent times, the state has

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[2] The first notice of appeal did not specify the statute under which the appeal was taken. See Sup. Ct. R. 18.1. The amended notice of appeal specified that the appeal was being taken pursuant to 28 U.S.C. 1253.

employed various means of destroying or diluting black voting strength." *Id.* at 103a-104a. Those means, which the court found had been enacted into law as late as 1958, included literacy tests, property requirements, white-only primaries, and the county unit system. The court specifically noted that "[c]ongressional districts have been drawn in the past to discriminate against black citizens by minimizing their voting potential." *Id.* at 104a. That was accomplished by "packing an excessive number of black citizens into a single district or splitting large and contiguous groups of black citizens between multiple districts." *Ibid.*

From Reconstruction until the 1980's, black voters were not in the majority in any of the State's congressional districts. Following the 1970 census, the Attorney General interposed a Section 5 objection to Georgia's congressional redistricting plan, which fragmented African-American population concentrations in the Atlanta area. Joint Statement of Stipulated Facts 44-49. The State then adopted, and the Attorney General precleared, a revised plan that remedied the fragmentation, but that did not have an African-American majority district. See *Busbee* v. *Smith*, 549 F.Supp. 494, 500 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983).

Following the 1980 census, the State drew a redistricting plan that included one majority African-American district (the Fifth District) in the Atlanta area (out of a total of ten Georgia congressional districts), but that nonetheless fragmented the African-American community in that area. The Attorney General again interposed a Section 5 objection, and the State sought preclearance from the United States District Court for the District of Columbia. The court denied preclearance on the ground that the plan had "a discriminatory purpose in violation of Section 5." 549 F. Supp. at 517. The court held that the plan "implemented a scheme designed to minimize black voting strength to the extent possible." *Id.* at 518. In

particular, the court noted that the State had applied its supposed districting principles selectively:

> The purported goals of maintaining 'historical borders,' preserving county and city lines and avoiding a Republican Fourth District were only pretexts for discrimination. Those goals were ignored when drawing the First, Third, Sixth, Seventh, Eighth, Ninth and Tenth Districts. * * * The goal of uniting a cohesive voting bloc was followed in the white mountain district; it was abandoned in the black south Fulton and DeKalb area.

Busbee, 549 F. Supp. at 515. The court also noted that the legislature had turned down a plan passed by the State Senate that provided for a district that did not split the black community of Atlanta. *Id.* at 504-512. Although the Fifth District had a bare African-American population majority, the court concluded that it nevertheless "was drawn to suppress black voting strength in Georgia." *Id.* at 515. The court ultimately precleared a revised plan that remedied the fragmentation. *Id.* at 520.

2. Following the 1990 census, Georgia became entitled to 11 congressional seats, a gain of one seat since 1980. In a special session in 1991, the state legislature passed a redistricting plan that included two majority-minority districts: the Eleventh, in east-central Georgia, and the Fifth, in the Atlanta area. In addition, the plan included a district—the Second District, in the southwest part of the State—in which African-Americans comprised approximately 35% of the voting age population. J.S. App. 12a-14a. See J.A. 98 (map).

The State submitted the plan for preclearance under Section 5 of the Voting Rights Act. Acting on behalf of the Attorney General (see 28 C.F.R. 51.5), the Assistant Attorney General for Civil Rights interposed an objection. The Attorney General's objection letter stated that there was "[a] concern * * * that the Georgia legislative leadership was predisposed to limit black voting

potential to two black majority districts." J.A. 105. The letter went on to note that the plan failed to "recognize the black voting potential of the large concentration of minorities in southwest Georgia" and that the legislature was aware of alternatives that would have recognized that potential. J.A. 105. The letter added that:

> Notwithstanding these alternatives, the state redistricting leadership did not make a good faith attempt to recognize the concentrations of black voters in the southwest and has not yet been able to adequately explain the departure from its own stated criteria and what appears to be resulting minimization.

J.A. 105-106. The letter also noted some other concerns with the plan, and concluded that the Attorney General could not "conclude * * * that the state's burden has been sustained in this instance with respect to the * * * plan[] under review." J.A. 106.

The state Senate then passed a plan that contained three majority-minority districts, the Second, the Fifth, and the Eleventh. See J.A. 98 (map). The Senate plan made the Second District a majority-minority district by extending it into Macon, in the central part of the State. The plan made up for the resulting loss of minority population in the Eleventh District by extending that district to Savannah. J.S. App. 16a. However, the House refused to pass that plan. The plan that the legislature then enacted contained two majority-minority districts (the Fifth and the Eleventh), increased the black voting age population in the Second District to 45%, and made a few other modifications to the previous plan. *Id.* at 16a & n.9.

The Attorney General again objected. The letter interposing the Section 5 objection stated that the concern "that the Georgia legislative leadership had been predisposed to limit black voting potential to two black majority voting age population districts * * * continues." J.A. 124. The letter noted that the plan enacted by the state Senate was abandoned "due to unyielding efforts on behalf of House members," and "no legitimate reason

has been suggested to explain the exclusion of the second largest concentration of blacks in the state [in Savannah] from a majority black Congressional district." J.A. 124. The letter also noted that the Second District did not include "large black population concentrations" in three counties, and that "the expressed reluctance to split counties * * * appears pretextual," in light of "[t]he state's willingness to split counties and cities in other areas of the state." J.A. 124-125. Because the State had "failed to explain adequately the choices made during this round of Congressional redistricting," J.A. 125, the letter concluded that an objection had to be interposed because the State had once again failed to sustain its burden under Section 5. J.A. 125.

After this objection, the State (at the advice of a Senior Assistant Attorney General of the State, Mark Cohen) decided not to seek preclearance for the revised plan in the District Court for the District of Columbia. Cohen subsequently testified that he believed at the time that such a suit would have been unsuccessful. That conclusion, he said, was based on similarities between the circumstances presented in 1992 and those underlying the unsuccessful *Busbee* suit a decade before. J.S. App. 20a n.11.

The state legislature then enacted a new plan that had three majority-minority districts and was similar to the plan the state Senate had previously passed. See J.S. App. 21a & n.12. See also J.A. 98 (map). In enacting this plan, the State clearly intended to create three majority-minority districts. The undisputed evidence at trial, however, showed that many other considerations also went into determining the boundaries of the Eleventh District. For example, in order to avoid dividing rural counties, while maintaining a majority of minority voters, it was necessary to create more irregular boundaries in urban areas. J.S. App. 43a n.26. The DeKalb County portion of the district was drawn to include a particular (largely white) precinct in the district to accommodate the desire of an incumbent state Senator regarding the placement

of the precinct in which his son lived. 2 Tr. 187, 202 (testimony of Linda Meggers). The boundaries of the extension of the district to Savannah through Effingham and Chatham Counties were determined by a number of factors. The corridor through Effingham County was substantially narrowed to respect the wishes of a state representative who wanted as much as possible of the County to remain in the First Congressional District. That narrowing required omission of black as well as white voters. 1 Tr. 106-108; 2 Tr. 189-190, 212-215 (testimony of Linda Meggers). In Chatham County, the district was narrowed to exclude a heavily African-American community in Garden City, a community just north of Savannah, because a state Representative wanted the entire city kept intact. 2 Tr. 218-220 (testimony of Linda Meggers). The Savannah extension was also configured by "the narrowest means possible" because an incumbent state Representative wanted certain areas excluded. 4 Tr. 174 (testimony of Johnnie Dixon). That configuration was adopted despite the fact that a much wider extension would have had little or no effect on the racial composition of the district. 4 Tr. 172-173, 175-178, 181-183 (testimony of Johnnie Dixon).

The plan was submitted to the Department of Justice for Section 5 preclearance. The Attorney General precleared the plan, and it took effect. J.S. App. 22a-23a.

3. In January, 1994, five white residents of the Eleventh Congressional District filed suit in the United States District Court for the Southern District of Georgia, alleging that the Eleventh District segregated voters on the basis of race in violation of the Equal Protection Clause. A three-judge court was convened. The United States and a number of citizens of Georgia intervened in support of the defendants. A trial took place on July 21-28, 1994. By a 2-1 vote, the three-judge court ruled that the configuration of the Eleventh District violated the Fourteenth Amendment. J.S. App. 1a-102a.

a. The district court narrated the history of the State's post-1990 redistricting in some detail and extensively dis-

cussed the Section 5 review of the various state plans undertaken by the Department of Justice. J.S. App. 5a-27a. From the beginning of the process, a plan with three majority African-American districts had been developed by the American Civil Liberties Union (ACLU) on behalf of the Black Caucus of the General Assembly and presented to the state legislature. *Id.* at 6a-7a. That plan included an extension of the Eleventh District to Savannah and the inclusion of portions of Macon in the Second District. Those elements, the court noted, were employed by the State in the plan that was finally enacted and precleared, although the final plan differed in other important ways from the ACLU's plan. *Id.* at 6a-9a, 101a (map). The court also stated that the ACLU had repeatedly brought its plan to the attention of the Department of Justice in the course of the Section 5 preclearance process; that the ACLU had used that plan to argue to the Department of Justice that the State's first two enacted redistricting plans should not be precleared; and that the Department of Justice's "criteria for and opinions of Georgia's submissions were greatly influenced by [the ACLU's attorney] and her agenda." *Id.* at 10a. The court stated that the State did not seek a Section 5 declaratory judgment, not only because of fear that such a suit would be unsuccessful, as the *Busbee* suit had been ten years earlier, but also because litigation would have been expensive and time consuming. *Id.* at 20a-21a & n.11.

With respect to the merits of plaintiffs' claim, the court held that the Eleventh District is subject to strict scrutiny. In *Shaw* v. *Reno, supra*, this Court held that a district is subject to strict scrutiny if it is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting." 113 S. Ct. at 2824. In the district court's view, that language does not suggest that "[t]he shape of the district is * * * a 'threshold' inquiry preceding an exploration of the motives of the legislature." J.S. App. 29a. Instead, the shape is simply " 'objective' evidence of the legislature's intent in

drafting that district," *ibid.*; "[t]he purpose of scrutinizing a district's shape is to glean the intent of the legislature by working backwards," *id.* at 41a. Therefore, the court concluded, a plaintiff can make out a *Shaw* claim *either* through proof concerning "a district's shape as circumstantial evidence of legislative intent," *id.* at 40a, *or* through "direct testimony of those involved with the [redistricting] process" concerning "the legislature's intent," *ibid.*

The district court held that strict scrutiny must be applied if "race was the *substantial or motivating* consideration in creation of the district in question"—a criterion the court explained as being satisfied if race is "*the overriding predominant force* determining the lines of the district." J.S. App. 35a (footnote omitted). In reaching that conclusion, the court rejected the view of the district court in *Hays* v. *Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993), vacated and remanded on other grounds, 114 S. Ct. 2731 (1994), that race "need only have been a recognizable factor—not the sole or dominant one—before a redistricting plan is constitutionally suspect." J.S. App. 33a. The court explained that adoption of the *Hays* standard would lead to jurisdictions covered under Section 5 of the Voting Rights Act being "buried under *Shaw* litigation" every time they passed a redistricting plan. J.S. App. 38a-39a. The court also rejected the view that "race must have been the *sole* motivation behind a particular district shape before strict scrutiny is appropriate." *Id.* at 33a. In the court's view, "th[at] standard would be nearly impossible to meet." *Id.* at 39a.

The district court found that the "indirect" evidence of legislative intent was sufficient in this case to subject the Eleventh District to strict scrutiny, because various portions of the district had irregular boundaries. In particular, the court held that "[t]he extension [of the district] to Savannah is not compact by any credible definition of that term," J.S. App. 43a; that the Augusta portion reflected a selective inclusion of predominantly African-

American census blocks, *id.* at 45a; and that the Eleventh District as a whole split eight of its 22 counties, a result that the court believed to be unnecessary, *id.* at 47a. The court also held that there was sufficient "direct" evidence that the legislature had a "predominant" racial motive for drawing the Eleventh District. *Id.* at 48a-51a. In particular, the court adverted to the testimony of state legislators that their purpose in extending the Eleventh District to Savannah was to include African-American voters in the district, in part to compensate for the African-American voters who were removed from the Eleventh District as previously configured and added to the Second District to make that a majority-minority district. *Id.* at 48a-50a. The court also referred to evidence that other portions of the district were drawn in order to include African-Americans in the district. *Id.* at 49a.

The district court then applied strict scrutiny. The court held that the only compelling state interest that could potentially justify the Eleventh District was the State's interest in complying with Sections 2 and 5 of the Voting Rights Act. J.S. App. 56a-57a. The district court assumed the existence of that interest and held that what it viewed as the "narrow tailoring" inquiry was crucial to the disposition of the case: whether "the district[], as precleared and enacted, [was] genuinely 'reasonably necesary' * * * to comply with the [Voting Rights Act]." *Id.* at 60a (citation omitted).

The court held that the Eleventh District failed that "narrow tailoring" test. In the court's view, the fact that the Department of Justice had refused preclearance of the State's earlier attempts at redistricting after the 1990 census did not establish that creating the Eleventh District was reasonably necessary to satisfy Section 5 of the Voting Rights Act. Instead, the court held that the plan would "live or die" on the basis of the court's independent determination of "whether Georgia's 1992 congressional redistricting plan was actually required by the [Voting Rights Act] and Supreme Court precedent." J.S. App. 63a.

With respect to Section 5, the court determined that the Department of Justice had erred in objecting to either of the first two plans submitted.[3] The court did not directly address the "purpose" prong of Section 5 in this portion of its opinion, although this was the basis articulated by the Department of Justice for its objections to those plans. Earlier in the opinion, however, the court reported that two state officials had found no "evidence of acts or statements by * * * legislators indicating an intent to discriminate against minority voters." *Id.* at 13a. The court commented, in that context, that it "finds no evidence prompting [it] to doubt" the conclusion that the original two plans were untainted by racially discriminatory purpose. *Id.* at 13a.

The court also held that the Eleventh District was not required by Section 2 of the Voting Rights Act. J.S. App. 80a. The court reached that conclusion by applying the preconditions set forth by the Court in *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986). The court found that the district was not "compact" because the "populations of the Eleventh are centered around four discrete, widely spaced urban centers that have absolutely nothing to do with each other[.]" J.S. App. 79a. The outside perimeter of the district, the court found, included "hooks, tails and protrusions" in and near densely populated urban

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[3] The court held that the objections to the earlier Georgia plans were inconsistent with regulations "promulgated by Congress to assist DOJ in properly enforcing the [Voting Rights] Act." J.S. App. 64a-65a (citing 28 C.F.R. 51.59). The court went on to discuss the regulations in terms of what "Congress intended," J.S. App. 65a; what "Congress was apparently worried" about, *ibid.*; and how "Congress uses" a particular term in the regulations, *id.* at 66a. The regulations to which the court referred, however, were not enacted by Congress; they were promulgated by the Attorney General. See 52 Fed. Reg. 490 (1987). There is no indication in the court's opinion that it gave any deference to the Attorney General's interpretation of her own regulations.

areas at its periphery. *Id.* at 79a. The court also found that racial polarization "exists, but not in alarming quantities"; the court found that from 22% to 38% of white people in the area would vote for African-American candidates, while 20% to 23% of African-Americans in the area would vote for white candidates. *Id.* at 82a. The court concluded that the State would not have violated Section 2 if it had failed to draw the Eleventh District as a majority-minority district.

Finally, the court concluded that, even assuming that the preconditions for a Section 2 Voting Rights Act violation existed in the area covered by the Eleventh Congressional District, the district "overstepped the requirements" for compliance and therefore was not narrowly tailored. J.S. App. 68a. The court based this conclusion on the testimony of the State's expert witness, which indicated to the court that the Eleventh District was more "safe" than necessary for black voters. *Id.* at 83a-86a.

b. Judge Edmondson dissented. In Judge Edmondson's view, "[h]ighly irregular shape—the appearance of the district—is the critical element of" the cause of action recognized by this Court in *Shaw*. J.S. App. 93a. Accordingly, he rejected the court's holding that a district's "shape is merely one piece of circumstantial evidence proving the legislature's intentional use of race." *Id.* at 94a. He noted that *Shaw*'s "highly-irregular-appearance standard * * * avoids the unreliability of after-the-fact statements by legislators and also avoids the necessity of federal judges probing and intruding on state officers' thoughts (perhaps expressly crediting some state officers and not crediting others—a divisive event) to 'learn' the state's true intent." *Id.* at 94a n.2.

Judge Edmondson found that the Eleventh District was not "bizarre or highly irregular within the meaning of *Shaw*." J.S. App. 96a. He noted that the size of the

district, the length of its borders, and its location within the State were not out of the ordinary. *Id.* at 97a-98a. Moreover, he noted that the Eleventh District's boundaries follow existing state, county and city borders to approximately the same extent (71%) as the average for the State's other congressional districts; that "Georgia's congressional districts have no tradition of being neat, geometric shapes"; that portions of other districts are more irregular than the particular portions of the Eleventh District criticized by the majority; and that other districts in Georgia's current plan, as well as past plans, split counties. *Id.* at 98a-100a. He concluded that the district "is not so bizarre on its face to justify, pursuant to the Constitution, a more searching inquiry," and that the district court accordingly should not "interfere with the reapportionment plan that resulted from Georgia's political process." *Id.* at 100a.

4. The district court enjoined the completion of the 1994 election cycle in the Eleventh District and stated that it would hold a remedial hearing after receiving submissions from interested parties. J.S. App. 89a. The Governor and two of the other state defendants, the private intervenor-defendants, and the United States moved for a stay in this Court. On September 23, 1994, this Court granted the stay pending the filing and disposition of the appeals in this case. 115 S. Ct. 36.

SUMMARY OF ARGUMENT

1. A. The district court held that, under this Court's decision in *Shaw* v. *Reno*, a majority-minority district is always subject to strict scrutiny if the State's "predominant" motive in creating the district was to create a majority-minority district. That conclusion is incorrect. Nothing in this Court's opinion in *Shaw* v. *Reno* suggests that a "predominant motive" to create a majority-minority district alone requires strict scrutiny. To the

contrary, the Court repeated numerous times in *Shaw* that the constitutional claim it recognized in that case arose because the shape of a majority-minority district "on its face" was so extremely irregular that it could only be understood as an effort to segregate voters racially.

The district court's standard is incorrect because a State should be free to give the same consideration to the interests of racial minorities in redistricting that it gives to the interests of other groups. The fact that a State strongly desires to create a majority-minority district indicates only that it is willing to treat minority interests on a par with those of other groups for whom majority influence districts are created. Nor is the State's action in creating such a district likely to have any discriminatory impact. Subjecting such a district to strict scrutiny is, moreover, inconsistent with Congress's determination that States must, in some circumstances, create minority districts in order to comply with Sections 2 and 5 of the Voting Rights Act. The district court's standard is also unworkable, since there is no judicially manageable standard for a court to determine whether a particular purpose, out of many that may have motivated a districting plan, is "predominant."

B. A redistricting plan that creates a majority-minority district is suspect under *Shaw* only if, in drawing the district, the State departs dramatically from its traditional districting practices. The Eleventh District, however, fits comfortably within Georgia's ordinary districting practices. It occupies an area similar in shape to the Tenth District, as that district has been configured for many years. Its physical area is about at the State's average. It follows existing boundaries of political subdivisions to a greater extent than most districts in the State. Although it contains a larger percentage of African-Americans than does the State as a whole, that suggests only that the State intended to draw a majority-minority district. The fact that the Eleventh District's borders (like those of other districts in the State) are irregular in places does not establish that

the shape of the Eleventh District, viewed as a whole, is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting." *Shaw*, 113 S. Ct. at 2824.

2. In any event, the Eleventh District satisfies strict scrutiny because it is narrowly tailored to further the State's compelling interest in complying with the Voting Rights Act and ameliorating the present effects of racially polarized voting.

A. To demonstrate that the State had a compelling interest in complying with Sections 2 and 5 in this case, it need not be shown that failing to draw a third majority-minority district would surely have subjected the State to liability under Sections 2 or 5 of the Voting Rights Act. It need only be shown that there was a "strong basis in evidence" for concluding that the State's failure to draw such a district would have led to a prima facie case against it under the Voting Rights Act. That showing was made here.

First, the State's interest in complying with Section 5 supported its action. The Attorney General had interposed Section 5 objections to the State's two previous plans. The State therefore could reasonably rely upon the Attorney General's objections as requiring it to draw a third minority district, so long as those objections were not clearly insupportable. In this case the objections, based on the "purpose" prong of Section 5, were supported by settled modes of analyzing whether state action is motivated by a racially discriminatory purpose.

Second, the State's interest in complying with Section 2 of the Voting Rights Act also supported its decision to draw three majority-minority districts. There was a sound basis in evidence for believing that all three of the *Gingles* preconditions were satisfied. In addition, the State had a strong basis for believing that African-Americans in Georgia would be substantially underrepresented in Congress unless a third majority-minority district were drawn.

The State also had a compelling interest in ameliorating the effect that historical discrimination and racially polarized voting continue to have on the opportunity of minority voters to elect a candidate of their choice in Georgia. Faced with the kind of extreme bloc voting present in Georgia, the State could properly seek, through districting, to ensure a fair allocation of political power.

B. Finally, the State's plan is narrowly tailored. It creates only the number of majority-minority districts that the States' interests in complying with the Voting Rights Act and fairly allocating political power justify. It does not needlessly pack minority voters into the majority-minority districts; the percentage of minority voters in the Eleventh District is well within the range that the State reasonably could have thought to be necessary to satisfy the identified compelling interests. And it gives sufficient weight to other redistricting interests.

ARGUMENT

I. GEORGIA'S REDISTRICTING PLAN IS NOT SUBJECT TO STRICT SCRUTINY

A. An Inquiry Into Legislative Intent Alone Can Not Determine Whether A Redistricting Plan Is Subject To Strict Scrutiny

The district court held that a redistricting plan must be subject to strict scrutiny under the Equal Protection Clause if "race was the *substantial or motivating consideration* in creation of the district in question." J.S. App. 35a. The court explained that standard as requiring strict scrutiny if the legislature "(a) was consciously influenced by race, and (b) while other redistricting considerations may also have consciously influenced the district shape, race was *the overriding, predominant force* determining the lines of the district." *Ibid.* According to the court, strict scrutiny is not required "[i]f race, how-

ever deliberately used, was one factor among *many of equal or greater significance* to the drafters." *Ibid.*

In our view, the district court's standard does not follow from this Court's decision in *Shaw* and is incorrect. A legislature's intent to create a majority-minority district (or to otherwise include some minority voters in, or exclude some minority voters from, a district) is not alone sufficient to trigger strict scrutiny of the legislature's redistricting. Under *Shaw* and this Court's decision in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* 430 U.S. 144 (1977), so long as the resulting district is not "bizarre," an intent to create a majority-minority district does not trigger strict scrutiny.

1. In our Brief in *United States* v. *Hays,* Nos. 94-558 and 94-627, we submit that the district court in that case erred in holding that the intent to create a majority-minority district was alone sufficient to trigger strict scrutiny. See *Hays* U.S. Br. 14-20. On the contrary, a State must be free, under the Equal Protection Clause, to give the same consideration to the claims of racial minority groups to influence redistricting as to the claims of other interest groups in the redistricting process. *Id.* at 15-17. Nor does the mere intent of a legislature to create a majority-minority district have the ill effects that this Court in *Shaw* identified as flowing from the creation of highly irregular districts that can be understood solely in racial terms. *Id.* at 17-18. Subjecting a plan to strict scrutiny merely on the basis of the State's intent to create a majority-minority district would also conflict directly with Congress's judgment, in enacting the Voting Rights Act, that States should be conscious of the racial consequences of their redistricting decisions. *Id.* at 18-19. And it would often confront States with a dilemma, in which they would face litigation with minority voters if they refuse to create a majority-minority district and litigation from others if they do. *Id.* at 19. Finally, a

broad holding that intent alone is sufficient to subject a plan to strict scrutiny would inevitably subject a very large number of redistricting plans at all levels of government to strict scrutinty. *Id.* at 20.[4]

2. The district court in this case attempted to remedy the deficiencies in the *Hays* court's bare intent standard by holding that a districting plan is subject to strict scrutiny only if "race was the *substantial or motivating consideration* in creation of the district in question." J.S. App. 35a (footnote omitted). The district court elaborated its point by stating that race must be an "*overriding predominant force* determining the lines of the district," *ibid.*, or that race must be "the most prominent element driving the legislatures' planning," *id.* at 35a n.19. The court contrasted that with cases in which race "was one factor among *many of equal or greater significance* to the drafters," *id.* at 35a, or where it was "one motivation among others of equal strength propelling the process," *id.* at 35a n.19. In those cases, the court held, strict scrutiny would be inappropriate.

Under the district court's standard, a court must inquire about the extent to which "the legislature was * * * consciously influenced by race" in drawing a challenged majority-minority district. J.S. App. 35a. That inquiry will be of particular importance in cases in which the challenged district comports with the State's ordinary districting practices, because the application of strict scrutiny

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[4] The district court in this case did not disagree with this last conclusion. The court observed that the district court in *Hays* had held "that race need only have been a recognizable factor—not the sole or dominant one—before a redistricting plan is constitutionally suspect." J.S. App. 33a. But, the court noted, if that standard were adopted, "every state and local government in the United States subject to section 5 of the Voting Rights Act [would] be buried under *Shaw* litigation every time it passes a redistricting plan." *Id.* at 38a-39a. The district court properly was "reluctant to conclude that [this Court] intended voting rights litigation to sweep the country at ten-year intervals." *Id.* at 39a.

to such districts will, under the district court's analysis, turn on the "predominant motive" inquiry. The court must also determine whether, among the "other redistricting considerations [that] may also have consciously influenced the district shape," race was—in the court's various formulations—the "substantial or motivating," "overriding," "predominant," or "most prominent" one. *Id.* at 35a & n.19. In other words the inquiry focuses on the relative weight of the different motivations that produced the district under attack. Strict scrutiny is apparently required if the court concludes that the racial motivation was of greater importance to the State than its other motivations in drawing the district.

3. This Court's decision in *Shaw* does not support the district court's conclusion that a legislature's "predominant" intent to create a majority-minority district triggers strict scrutiny. This Court held in *Shaw* that a redistricting plan is subject to strict scrutiny if it is "so extremely irregular *on its face* that it rationally can be viewed only as an effort to segregate the races for the purposes of voting." 113 S. Ct. at 2824 (emphasis added). The Court repeated that standard several times in its opinion in *Shaw*; each time the opinion unequivocally stated that the inquiry was a facial one. See *id.* at 2824, 2825, 2826, 2828, 2829, 2832. An inquiry into the characteristics of a statute "on its face" plainly requires more than a determination of whether the legislature intended—or "predominantly" intended—to achieve a desired result.

4. *Shaw*'s limiting language correctly reflects the relevant constitutional values. Strict scrutiny is not appropriate merely because a legislature's "substantial or "motivating" intent—*i.e.*, the "most prominent element driving the legislature's planning," J.S. App. 35a n.10—was to create a majority-minority district. As we noted above, under the Equal Protection Clause, a State must be free to give the same consideration to the claims of racial minority groups that seek to influence redistricting as to

the claims of any other interest group. Indeed, the Constitution itself may require a State to take action to avoid the consequences of racial discrimination under the Fourteenth and Fifteenth Amendments. The fact that a State strongly desires to create a particular district with a majority-minority population says nothing about whether the State has taken action that amounts to a special preference for that group. For the State may have an equally strong desire to accommodate other ethnic, religious, political, or other interest groups by drawing lines that accommodate them in other districts. See *Hays* U.S. Br. 15-17. It is therefore not the strength of the State's desire to create a district for a racial minority group that is important, but whether the State has taken action that gives a special preference to that group that it is unwilling to give to others who are similarly situated.

The district court's analysis is also inconsistent with the principle that state action violates the Equal Protection Clause only if it has discriminatory consequences. In *Shaw*, this Court identified two potential injuries that were of concern in this area: the conveying of a message that all members of a particular racial group, regardless of where they live and what other characteristics they may have in common, "think alike, share the same political interests, and will prefer the same candidates at the polls," 113 S. Ct. at 2827, and the likelihood that elected officials from the district in question would be "more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Ibid.* Because this is "one area in which appearances do matter," *ibid.*, those injuries may flow from a district whose extraordinary appearance advertises that the legislature was according special treatment to members of a minority group that it would not give to others similarly situated. Those injuries are unlikely to flow, however, from the fact that the legislature, in drawing a district that comports with its traditional, legitimate districting practices, strongly desired to accommodate the interests of a racial minority group, in the

same way as it accommodates the interests of other groups that attempt to influence legislative districting decisions. See *Hays* U.S. Br. 17-18.

5. The district court's standard disserves other important values as well. In some instances, States are required by Sections 2 or 5 of the Voting Rights Act to draw reasonably compact majority-minority districts. In such situations, a State's desire to draw a majority-minority district may naturally be an "overriding" or "predominant" motive. Under the district court's analysis, however, that would virtually ensure that the State's proper desire to comply with federal law subjects the resulting redistricting plan to strict scrutiny. See *Hays* U.S. Br. 18-19.

The district court's standard is also unworkable. In other contexts, the Court has rejected judicial inquiry into whether "a particular purpose," out of many that may have motivated a "legislature or administartive body operating under a broad mandate" to make a decision, "was the 'dominant' or 'primary' one." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977). That is because "[i]t is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators." *Palmer* v. *Thompson*, 403 U.S. 217, 225 (1971). "The search for legislative purpose is often elusive enough without a requirement that primacy be ascertained." *McGinnis* v. *Royster*, 410 U.S. 263, 276-277 (1973) (citation omitted).

The inquiry into which of many different legislative purposes underlying a particular act is "overriding" or "predominant" is particularly indeterminate in the case of redistricting plans. Where a legislature is forced to choose between advancing two different purposes, a court may fairly infer which was more important from the choice the legislature made. But where the legislature may accomplish a number of different compatible goals by enacting a particular redistricting plan with a reasonably compact majority-minority district, a court has no guidepost by which to determine the relative weights of

the various goals the legislature was attempting to achieve. Moreover, looking at a single district in isolation necessarily distorts the inquiry. As Judge Edmondson recognized in his dissenting opinion, because "apportionment is a highly political process * * * [m]any different agendas may be at work." J.S. 94a n.2. An accommodation to some faction's interests in one part of the plan may be essential to that faction's support of some other part of the plan. To attempt to determine the "substantial or motivating," "overriding," "predominant," or "most prominent" motive in redistricting will often be a futile and quixotic task. *Id.* at 35a & n.19.[5]

The technique for determining "predominant" motivation adopted by the district court here was to rely on the after-the-fact testimony of some of the legislators who had been involved in the districting process. J.S. App. 49a-50a. The testimony of an individual legislator about the legislature's "dominant" motive in enacting legislation, however, is not a reliable indicator of legislative intent. See, *e.g.*, *Bread Political Action Comm.* v. *Federal Election Comm'n*, 455 U.S. 577, 582 n.3 (1982); *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980); *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979). As Judge Edmondson pointed out, that is particularly true where the individual legislators' statements are made after the enactment of the statute in question. J.S. App. 94a n.2; see also *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990); *Public Employees Retirement System of Ohio* v. *Betts*, 492 U.S. 158, 168 (1989).

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[5] There was substantial and largely undisputed evidence at trial that the Eleventh District itself, from its inception, was the product of a host of political and other motivations. See pp. 6-7, *supra*. The district court did not make any findings to the contrary.

B. Georgia's Eleventh District Is Not So Highly Irregular On Its Face That It Can Be Understood Only As An Effort To Segregate The Races For Purposes Of Voting

The district court also subjected the State's plan to strict scrutiny on the ground that it appears "uninfluenced by accepted districting principles, as evidenced by its shape." J.S. App. 41a. The court erred in reaching that conclusion.

1. In our brief in *Hays*, we identified four legal principles that we believe should guide the inquiry into whether a district is so highly irregular on its face that it can be understood only as an effort to segregate the races for purposes of voting. First, the manner in which the State has drawn and continues to draw other districts is the most appropriate benchmark for determining whether a particular majority-minority district is "bizarre." Second, a district is suspect under *Shaw* only if it departs dramatically from the State's traditional districting practices. Third, the *Shaw* "on its face" inquiry mandates an objective inquiry into the nature of the district, not a subjective inquiry into the legislature's intent. Fourth, since the relevant inquiry under *Shaw* is whether the *district* as a whole is "bizarre," the fact that isolated segments of a district are irregular does not make the district itself bizarre. See *Hays* U.S. Br. 21-22. These same principles should guide the inquiry in this case.

2. Application of these legal standards leads to the conclusion that the Eleventh District is not "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting." *Shaw*, 113 S. Ct. at 2824.

The appearance of the Eleventh District on a map comports reasonably with Georgia's ordinary districting practices. The district's shape is largely based on a core area in the central and eastern portions of Georgia. The district generally occupies an area similar in shape to, but

south of, the former Tenth District, which also spanned the central part of the State from Augusta to the Atlanta suburbs. The district's land area is about the State's average.[6]

The Eleventh District satisfies Georgia's own districting guidelines. Those guidelines provided that "efforts may be made to maintain the integrity of political subdivisions and the cores of existing districts" and that "consideration may be given to avoiding contests between existing incumbents." J.A. 75 (Senate), 68 (House). They also counseled against unnecessary splitting of precincts. J.A. 75-76 (Senate), 68-69 (House). The State's guidelines do not mention "compactness" as a criterion.

The Eleventh District shows substantial respect for political subdivision boundaries. Cf. *Shaw*, 113 S. Ct. at 2826, 2827 (recognizing importance of this factor); see also J.S. App. 96a (Edmondson, J., dissenting). Of the 22 counties in the Eleventh District, 14 are intact and eight are divided. That puts the Eleventh District at about the state average in divided counties. By contrast, of the five counties in the Sixth District, none are intact and of the four counties in the Fourth District, only one is intact.[7]

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[6] The district spans 6,784 square miles. The First, Second, and Eighth Districts each encompass more than 10,100 square miles. The Ninth district has an area of 5,800 square miles and the Tenth District has an area of 5,100 square miles. State Exh. 177, at 4. In past plans, the State has drawn many districts of similar size. See J.A. 78, 79, 80, 81 (maps).

[7] The First District has 20 intact counties and parts of 2 others. The Second District has 24 intact counties and parts of 11 others. The Third District has 8 intact counties and parts of 8 others. The Fifth District is composed of parts of 4 counties. The Seventh District has 10 intact counties and a part of 1 county. The Eighth District has 22 intact counties and parts of 10 others. The Ninth District has 19 intact counties and a part of one other. The Tenth District has 16 intact counties and parts of three others. The figures are derived from Joint Exhibit 17.

Seventy-one percent of the boundaries of the Eleventh District follow the lines of political subdivisions. Of the State's 11 districts, five score lower than the Eleventh District on that measure and five score higher.[8] Eighty-three percent of the geographic area of the district lies within intact counties, above average for the State's congressional districts.[9] J.S. App. 96a-97a.

Georgia has frequently drawn districts that cover a substantial east-west or north-south portion of the State, as does the Eleventh District. The Ninth District, for example, covers the State's entire northern border. See J.A. 51 (map). The First, Second, and Eighth Districts all begin at the Florida border and extend north past the center of the State. See *ibid.* In the 1980's, the Eighth District extended even farther, from the southeast border with Florida in a rather irregular pattern almost to the Atlanta suburbs. See J.A. 80 (map).

3. The district court approached the question of whether the district was "bizarre" by assuming that the purpose of the inquiry was to uncover whether the State had an "overriding objective to include minority populations in the Eleventh [District]." J.S. App. 47a. As we argue above, that is not the proper focus of the *Shaw* analysis. The district court's improper focus led it to give inappropriate significance to several factors.

For example, the district court repeatedly emphasized that African-Americans formed a larger percentage of the population of the Eleventh District (64.07%) than of

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[8] The district with the lowest score on that measure is the Sixth, only 45% of whose boundaries follow political subdivision lines. The highest district on that measure is the Ninth, with a score of 91%. State Exh. 177, at 3.

[9] Only three districts—the First, Seventh, and Ninth—score higher than the Eleventh District on that measure. Excluding the Fifth and Sixth Districts, which contain no intact counties, the scores on that measure range from about 30% for the Fourth District to 97% for the Seventh District. State Exh. 177, at 4.

the State as a whole (26.96%), J.S. App. 46a, and that the portions of the Eleventh District in Chatham, Richmond, and DeKalb Counties had a larger percentage of African-American population than did those counties as a whole.[10] See J.S. App. 43a, 45a-46a. Those facts certainly tend to prove a fact that was stipulated in this case: that "race was a significant consideration in the configuration of the Eleventh Congressional District, including being a consideration in the inclusion of certain portions of DeKalb County, the City of Augusta [Richmond County], and the City of Savannah." J.A. 21-22. But they are not in the least probative on the issue of whether the district's shape is a dramatic departure from the State's ordinary districting practices.

The district court also discounted the evidence that the Eleventh District's boundaries largely follow precinct lines, on the ground that "[the State] designed the Eleventh District along racial lines, and race data was most accessible to [the State] at the precinct level." J.S. App. 44a. The State's own guidelines, however, provided that "[l]ocal voting precinct boundary lines should serve as the basic district building block in order to minimize voter confusion and cost of election administration." J.A. 68-69 (House), 75 (Senate). The fact that the State generally followed that neutral and traditional districting criterion in drawing the Eleventh District tends to show that the District's lines do *not* mark a dramatic departure from the State's own districting criteria.

4. The district court also believed that the configuration of the Eleventh District in the areas of Savannah (Chatham County), Augusta (Richmond County), and the Atlanta suburbs (DeKalb County) was sufficiently irregu-

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[10] African-Americans are 38% of the population of Chatham County, 42% of the population of Richmond County, and 42.2% of the population of DeKalb County. The portion of the Eleventh District in Chatham County is 84% black, the portion in Richmond County is 66% black, and the portion in DeKalb County is 74.6% black. J.S. App. 43a, 45a-46a.

lar to trigger strict scrutiny. J.S. App. 42a-43a, 45a-46a. In our view, the irregularities of the district's lines in those areas are insufficient to trigger strict scrutiny. This Court explained in *Shaw* that strict scrutiny is reserved for those "rare" plans, 113 S. Ct. at 2825, that create districts that are "extremely irregular" or "bizarre," 113 S. Ct. at 2824, 2825. The fact that the Eleventh District's lines are irregular in certain isolated areas is insufficient to support a finding that the district's shape is, on the whole, "bizarre."

Moreover, even when viewed in isolation, the boundaries in those urban and suburban areas are not "bizarre." For example, in DeKalb County, the Eleventh District essentially comprises the entire southern portion of the county; on the east, south, and west, the district lines are largely coterminous with the county lines.[11] Similarly, in the cities of Augusta and Savannah, the district includes identifiable portions of the cities and its lines largely follow precinct lines that themselves follow political boundaries, such as those of state legislative districts, and major landmarks, such as main streets and highways.[12] Even if the Court were to conclude that the boundaries in isolated areas of the district are "bizarre," the boundaries were determined by numerous political factors and are therefore explainable on grounds other than race. See *Shaw*, 113 S. Ct. at 2825; see pp. 6-7, *supra*. The district court disregarded that evidence.

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[11] Linda Meggers, the State's demographer, testified that the district lines in DeKalb County followed I-285 and the Stone Mountain Freeway. 2 Tr. 200. The northern boundary is largely governed by the borders of the cities of Atlanta, Decatur, and Avondale Estates. 2 Tr. 197, 199-200.

[12] See, *e.g.*, 2 Tr. 128 (major roads and landmarks generally used), 215 (major roads), 224 ("local visible boundaries"); 4 Tr. 177 (state legislative district).

II. THE ELEVENTH DISTRICT SATISFIES STRICT SCRUTINY

Even if the district court were correct in subjecting the Eleventh District to strict scrutiny, the court erred in concluding that strict scrutiny was not satisfied. The State's plan, including the Eleventh District, was narrowly tailored to further the State's compelling interests in complying with the Voting Rights Act and ameliorating the effect that historic discrimination and persistent racial polarization have on the opportunities of minority voters to elect the candidates of their choice.

A. The State Had A Compelling Interest In Drawing The Eleventh District As A Majority-Minority District

1. A State has a compelling interest in complying with Sections 2 and 5 of the Voting Rights Act. The district court appeared to accept that principle, see J.S. App. 58a-59a, but went on to undertake a *de novo* consideration of whether Sections 2 and 5 required the creation of the Eleventh District. J.S. App. 66a-87a. The court concluded that neither Section 2 nor Section 5 provided a sufficient justification for the creation of three majority-minority districts in Georgia, and that the State accordingly had no compelling interest in creating the Eleventh District as a majority-minority district.

As we explained in our brief in *Hays,* the district court's approach is mistaken. See *Hays* U.S. Br. 27-28. In order to invoke the Voting Rights Act as a justification, it need not be shown that the Act required the drawing of a third majority-minority district. Rather, it need only be shown that there was a "strong basis in evidence" for the State's actions—a standard that is satisfied if there was a sound basis for believing that the State's failure to draw a third majority-minority district would have led to a prima facie case against it under either Section 2 or 5 of

the Voting Rights Act. *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500 (1989); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion); *id.* at 292-293 (O'Connor, J., concurring); *Johnson* v. *Transportation Agency*, 480 U.S. 616, 652-653 (1987) (O'Connor, J., concurring in the judgment).

a. *Section 5.* The State had a sound basis for concluding that the creation of a third majority-minority district was necessary to comply with Section 5. Section 5 forbids a jurisdiction from implementing a redistricting plan unless it can show that the plan has neither a discriminatory purpose nor a discriminatory effect. 42 U.S.C. 1973c. No party in this case argued that Georgia had to create a third majority-minority district in order to satisfy the retrogression criterion embodied in Section 5's "effect" prong. See *Beer* v. *United States*, 425 U.S. 130 (1976). Even when a redistricting plan is not retrogressive, however, a State cannot obtain preclearance unless it makes the further showing that the plan is free of discriminatory purpose. *City of Pleasant Grove* v. *United States*, 479 U.S. 462, 469, 471 & n.11 (1987); *City of Port Arthur* v. *United States*, 459 U.S. 159, 168 (1982); *City of Richmond* v. *United States*, 422 U.S. 358, 378-379 (1975); *Busbee* v. *Smith*, 549 F. Supp. 494, 500 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983). Therefore, the question is whether the State had a strong basis in evidence for believing that it would not be able to prove the absence of a discriminatory purpose if it failed to draw the third majority-minority district.

(i). Instead of undertaking that inquiry, the district court inquired into whether the State's failure to draw the third majority-minority district would, in the court's independent judgment, have violated Section 5. That is not the appropriate legal standard. As we argued in our brief in *Hays*, the benefits Congress ought to achieve in providing for administrative preclearance under Section 5 would be

lost if the States could not generally rely on the Attorney General's "administrative finding" of discrimination. *Regents of the Univ. of Calif.* v. *Bakke*, 438 U.S. 265, 305 (1978) (opinion of Powell, J.). See *Hays* U.S. Br. 31-32. Given the Attorney General's important role in the Section 5 statutory scheme, a State should be able to act on the assumption that the Attorney General has correctly objected to its plan, unless the objection is clearly insupportable. *Shaw* v. *Hunt*, 861 F. Supp. 408, 443 & n.34 (E.D.N.C. 1994); *see UJO*, 430 U.S. at 175 (Brennan, J., concurring in part) (Attorney General's judgment that a particular districting scheme complies with the remedial objectives of the Voting Rights Act is entitled to "considerable deference"); cf. *Presley* v. *Etowah County Comm'n*, 112 S. Ct. 820, 831 (1992) (court must defer to Attorney General's construction of Section 5, unless unreasonable or contrary to congressional intent).[13] A State should not generally be required, before it can respond to the Attorney General's objection, to expend substantial time and resources (and to delay its redistricting process by what may be a period of years) litigating the validity of the Attorney General's objection in a judicial preclearance action in the District Court for the District of Columbia. See also *Morris* v. *Gresette*, 432 U.S. 491, 504-505 (1977) (Attorney General's Section 5 objection not reviewable).

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[13] Jurisdictions often have to act particularly quickly—and thus to rely on the administrative preclearance process—in the redistricting context. Between 1991 and 1994, the Attorney General received administrative submissions seeking Section 5 preclearance for more than 2700 redistricting plans. During that same period, only eight declaratory judgment actions were filed seeking preclearance for redistricting plans. The Attorney General made merits determinations regarding 2438 redistricting plans between 1991 and 1994, and precleared all but 183 (or 7.5%) of them. During the comparable period in the last decade, the Attorney General made determinations concerning 1373 redistricting plans and objected to 113 (or 8.2%) of them.

(ii). In this case, the Attorney General interposed Section 5 objections to each of the State's two previous redistricting plans, on the ground that the State had failed in each case to carry its burden of showing that it had not acted with a discriminatory purpose in drafting those plans. See pp. 4-7, *supra*. Accordingly, so long as it could not be said that the Attorney General's objections were clearly insupportable, the State was justified in relying on the objections in concluding that it must draw a third majority-minority district.

Here, the Attorney General's objections were in fact well founded. First, as the district court noted, Mark Cohen, a Senior Assistant Attorney General of Georgia, see J.S. App. 10a, testified that "the circumstances of the 1991-92 redistricting were similar to those of 1981-82," *id.* at 20a n.11, when the district court, in a decision subsequently affirmed by this Court, denied the State's request for a declaratory judgment that its redistricting plan was not motivated by a discriminatory purpose. See *Busbee* v. *Smith*, 549 F. Supp. 494 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983).[14] The district court did not challenge that conclusion. J.S. App. 20a-21a n.11.[15] Indeed, in 1981-1982, as here, the legislature had applied its purported districting principles selectively. See *Busbee*, 549 F. Supp. at 514. In addition, in both 1981-1982 and the

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[14] Cohen had also represented the State in the *Busbee* litigation. He testified at trial in this case that he had thought it likely that the State would lose a Section 5 suit to preclear either of the plans to which the Department of Justice had objected. 5 Tr. 5.

[15] The district court added that "the cost of litigating in D.C. and the time pressures on the Assembly" also were factors making a declaratory judgment action "not likely." J.S. App. 20a-21a n.11. The cost of litigation is always a disincentive. A State ought not be required to undergo those costs and litigate what it reasonably believes might be a futile lawsuit in Washington, rather than accepting the Attorney General's objection and taking remedial steps to cure it.

1991-1992 round of redistricting, the state Senate had passed a plan that would have remedied the identified discrimination, while the state House refused to do so. *Id.* at 504-512. The fact that the State had been unable to prevail in a Section 5 declaratory judgment action when it had previously faced a similar Section 5 "purpose" objection from the Attorney General strongly supported its conclusion that it was unlikely to prevail in this case.

There were also other factors supporting the conclusion that the State might not be able to establish that it acted without a discriminatory purpose had it not created a third majority-minority district. This Court has explained that the "historical background of the decision," especially if it reveals a "series of official actions taken for invidious purposes," *Arlington Heights*, 429 U.S. at 267, militates in favor of an inference of intent. The district court judicially noticed the State's history of racial discrimination in voting, see J.S. App. 103a-104a, which included "various means of destroying or diluting black voting strength" and which spanned the period from the State's first Constitution "through recent times." J.S. App. 104a. For example, "[c]ongressional districts have been drawn * * * to discriminate against black citizens," and the State's plans "discriminated by packing an excessive number of black citizens into a single district or splitting large and contiguous groups of black citizens between multiple districts." *Ibid.* That history, which continued into the 1980's, when *Busbee* was decided, would have supported an inference of discriminatory purpose here.

Arlington Heights also teaches that departure from a jurisdiction's normal way of conducting its affairs can give rise to an inference of discriminatory intent. 429 U.S. at 267. The Section 5 objection letters referred to the fact that in passing its first two plans after the 1990 census, Georgia had departed from its own commitment to treat keeping counties and cities intact as a secondary interest. J.A. 106, 125. In each of the two plans, the

Sixth District, for example, contained no complete counties and parts of five others. The testimony was unequivocal that the Sixth District's odd configuration reflected political, not racial, purposes. The plans thus exhibited the State's willingness to split political subdivisions to serve partisan political ends, but an unwillingness to do so to recognize black minority political interests. Such inconsistent application of substantive criteria was noted by the Attorney General, J.A. 105-106, 125, and would have supported a finding that the State's avowed goal to avoid splitting counties was pretextual.

This Court recognized in *Arlington Heights* that "[t]he impact of the official action—whether it 'bears more heavily on one race than another'—may provide an important starting point" in the inquiry into intent. 429 U.S. at 266 (citation omitted). Similarly, in the voting rights context, this Court held in *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982), that the "overwhelming evidence of bloc voting along racial lines" and the fact that "no black had ever been elected to [the legislative body in question]" were facts that "bear heavily on the issue of purposeful discrimination." As we discuss below, see p. 37, *infra*, there was very substantial evidence of racial bloc voting in this case. There was also evidence that black candidates had in the past virtually never been successful when they ran from majority-white districts and that blacks would consequently be significantly underrepresented in the State's congressional delegation if only two majority-minority districts were created. The State thus knew that its failure to create a third majority-minority district could be viewed as having an adverse impact on minority voters, and that that fact would be of relevance in a purpose inquiry.

A straightforward application of the principles for analyzing discriminatory purpose therefore supported the Attorney General's conclusion that the State had not met its burden of showing that its reasons for not drawing

a third majority-minority district were not pretexts for minimizing black voting strength. The State's compelling interest in complying with Section 5 therefore justified its decision to draw a plan with three majority-minority districts.

(iii). In connection with its inquiry into the Section 5 issues in this case, the district court permitted respondents, over our objection, to obtain discovery and to introduce extensive testimony concerning the operation of the Section 5 preclearance process in this case. That evidence included the live testimony of one DOJ attorney who was involved with the Section 5 process and the testimony by deposition of another DOJ attorney and former Assistant Attorney General Dunne.

We continue to believe that that inquiry should not have been undertaken. The Assistant Attorney General and his staff received numerous communications from many individuals interested in the Georgia redistricting process —including numerous communications from attorneys representing the state legislative black caucus and its members. See J.S. App. 9a-11a, 19a-20a, 26a-27a. The governing DOJ regulations provide that any information received from any individual or group "shall be considered along with the materials submitted [by the jurisdiction] and materials resulting from any investigation." 28 C.F.R. 51.30(a).[16] Such consideration was accorded in this case, and nothing in the district court's opinion suggests otherwise.[17]

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[16] The regulations provide that "[a]ny individual or group may send to the Attorney General information concerning a change affecting voting." 28 C.F.R. 51.29. Such information may be provided "at any time." 28 C.F.R. 51.29(c). It is important that the Assistant Attorney General be able to consider such information, since he has only 60 days from the submission of a voting change to determine whether it should be precleared. 42 U.S.C. 1973c.

[17] The district court adverted to one general practice that it disagreed with: the Department's practice of respecting the ano-

The district court acknowledged that "the motivations of the State of Georgia are the legally relevant motivations in this case, and not those of the ACLU or the DOJ." J.S. App. 9a. That statement was correct as to the analysis of the State's interest in complying with Section 5, and the inquiry into DOJ procedures and the thought processes of individual DOJ attorneys had nothing to do with any issue properly before the court.

The only respect in which the court's inquiry into the Section 5 process arguably could affect the court's ruling on the merits in this case was the court's conclusion that the Department had adopted a "maximization" policy that required the State to draw as many majority-minority districts as possible. See J.S. App. 64a. The court's characterization of the Attorney General's policy and practice is, however, inaccurate. The Section 5 process is tailored to the specifics of each case, and no general requirement of maximization—or of proportionality—is imposed.[18]

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nymity of its sources when requested, pursuant to regulation. See 28 C.F.R. 51.29(d). We believe that that practice is sound, especially considered in light of the history of voting rights enforcement in this country. The district court also suggested that a state Senator was "offended" at a meeting with DOJ officials, either because of "anonymous allegations," of which he was presumably informed, "or some other suggestion." J.S. App. 24a. The fact that an individual felt "offended" for an undetermined reason at a meeting at which highly controversial issues were discussed hardly suggests misconduct on the part of any DOJ official.

The court also criticized the Department for what it believed to be a "leak" of the Department's second objection to the legislative black caucus before the State itself was informed. J.S. App. 26a. Any such "leak" would have been in direct contravention of the Department's policy and should not have occurred. The issue, however, has nothing to do with the merits of the present case.

[18] See James P. Turner, "Case-Specific Implementation of the Voting Rights Act," in Bernard Grofman and Chandler Davidson, eds., *Controversies in Minority Voting* (The Brookings Institution, Washington, D.C. 1992); Dunne, *Redistricting in the 1990s: The New York Example*, 14 Cardozo L. Rev. 1127 (1993); Grofman,

See 28 C.F.R. 51.57 *et seq.* (standards by which Section 5 submissions are judged). Providing the opportunity for minority representation is of course considered as a relevant factor in the Section 5 process; here, three majority-minority districts out of 11 was almost exactly proportional to the number of minority group members in the population. See J.S. App. 68a. As this Court explained in *Johnson* v. *DeGrandy*, 114 S. Ct. 2647 (1994), "proportionality" in that sense—*i.e.*, the relationship between the number of majority-minority districts and the minority's percentage of the population—is "obviously" of relevance to a Section 2 claim, 114 S. Ct. at 2661, 2662 & n.17, and as the Court explained in *Arlington Heights*, see p. 33, *supra*, evidence of such discriminatory effects as underrepresentation is also relevant to a claim of discriminatory purpose.

b. *Section 2.* In *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986), the Court established the three preconditions for a Section 2 vote dilution claim in a districting case. Plaintiffs must show that (1) the minority population is sufficiently numerous and compact to constitute a majority in a single-member district, (2) the minority group is politically cohesive, and (3) whites usually vote sufficiently as a bloc to defeat the minority's preferred candidate. As we explained in our brief in *Hays*, see *Hays* U.S. Br. 28-29, in light of *Gingles* and this Court's decision in *Johnson* v. *DeGrandy*, 114 S. Ct. 2647, 2658-2662 (1994), a State would have a reasonable basis for creating a majority-minority district to comply with Section 2 when each of the three *Gingles* preconditions could be established against it and when, without such a district, the number of districts in which minorities would have an opportunity to elect candidates of choice would be disproportionately small compared to the group's proportion of the population. See also *Johnson*, 114 S. Ct. at 2664

Would Vince Lombardi Have Been Right If He Had Said: "When It Comes To Redistricting, Race Isn't Everything, It's The Only Thing"?, 14 Cardozo L. Rev. 1237, 1265-1266 (1993).

(O'Connor, J., concurring); *Shaw* v. *Hunt*, 861 F. Supp. at 440-441 & n.28.

The State had reason to know that voting in Georgia could be found to be polarized on the basis of race, and the district court in this case in fact found that it was.[19] The court found that only 22% to 38% of white people in the area were willing to vote for African-American candidates, while only 20% to 23% of African-Americans in the area would vote for white candidates.[20] J.S. App.

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[19] The parties stipulated that courts had previously found racially polarized voting in elections in Bleckley, Burke, Carroll, Colquitt, Dougherty, Fulton, Putnam, Wilkes, and DeKalb Counties. Joint Statement of Undisputed Facts, at 29-30.

[20] The district court found that racially polarized voting "exists," although the court characterized it as "not in alarming quantities." J.S. App. 82a. The court's assessment of the significance of the fact that the white crossover vote ranged from 22% to 38%—*i.e.*, that about 70% of the white voters would not vote for candidates of choice of the black community—is doubtful. In any event, the district court substantially overestimated the white crossover vote, and the State had a strong basis for believing that the crossover vote was much smaller. Dr. Allan Lichtman, the United States' expert, using Democratic primary elections including primary elections for Congress in the Second and Eleventh Districts, found that white cross-over voting ranged from 7% to 29%, except in elections having multiple black candidates. 5 Tr. 202-224; U.S. Exh. 24, tables 1-4. Dr. Ronald Weber, plaintiffs' expert, agreed that Democratic primaries were the most "probative" elections, although he believed that other elections were relevant as well. 4 Tr. 314, 318, 286-290. Moreover, the figure cited by the district court includes consideration of judicial elections involving an appointed black incumbent and elections in which there were multiple black candidates and a white candidate, both of which are substantially less probative of racially polarized voting in congressional elections between one black and one white candidate. See 5 Tr. 201 (testimony of Alan Lichtman). See also *Thornburg* v. *Gingles*, 478 U.S. 30, 57 (1986); *Collins* v. *City of Norfolk*, 883 F.2d 1232, 1243 (4th Cir. 1989), cert. denied, 498 U.S. 938 (1990). Dr. Weber himself testified that, if the judicial incumbent elections were removed from his own calculation, the white crossover vote would drop to 26.6%, and if the elections involving multiple black candidates were removed, the white crossover calculation would drop to 17%. 4 Tr. 325.

82a. The State also knew that, with one exception, all of the black state legislators in Georgia were elected in districts that were at least majority black and, more often, at least 60% black. See docket no. 62, at 19. Indeed, of the 181 majority-white state legislative districts, only one was represented by an African-American. *Ibid.* As for "compactness," nothing in *Gingles* requires any absolute measures. That case requires only that the potential majority-minority district be reasonably compact in light of the state's redistricting practices. As we have argued above, the Eleventh District satisfied that criterion. See pp. 23-25, *supra.* Finally, had the State created only two majority-minority districts out of eleven (or 18%), the State had reason to believe that the opportunities for minority voters, who constitute 27% of the State's population, to elect candidates of their choice would have been disproportionally small.

Respondents have argued that, because the State itself has not advanced an interest in complying with Section 2 as a justification for the Eleventh District, no such interest could be recognized. That is incorrect. The critical inquiry is whether the objective facts considered by the State at the time of redistricting would have reasonably supported a conclusion that a prima facie case existed under Section 2. The failure of the state defendants to argue that the State was in danger of violating Section 2, especially where the State was litigating similar issues in other cases, does not preclude a finding that the State's need to ensure compliance with Section 2 was a compelling interest sufficient to support its determination to create a third majority-minority district. The State is not required to expose itself to liability in other settings in order voluntarily to comply with the Voting Rights Act with regard to redistricting.[21]

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[21] Both at the time of redistricting and when trial was held in this case, Georgia was defending Section 2 challenges to its majority vote requirement and its at-large system for electing judges. *Brooks* v. *Miller*, Civ. No. 1:90-CV-1001-RCF (N.D. Ga.) (majority-

c. *Ameliorating Polarization.* A State may also have a compelling interest, independent of the Voting Rights Act, in eradicating the effects of past discrimination, which have resulted in racially polarized voting and a diminution of the opportunities of minority voters to elect the candidates of their choice. See *Hays* U.S. Br. 33-34. That interest was recognized by three Justices in *UJO*. See 430 U.S. at 167 (White, J., joined by Rehnquist and Stevens, JJ.). It also follows from the general principle, recognized by this Court in *Croson*, that a State has a compelling interest in remedying identified discrimination within its jurisdiction, even when it has no federal statutory duty to do so. 488 U.S. at 491-493, 509.

Applying that analysis leads to the conclusion that polarized voting in Georgia gives the State a compelling interest in creating a plan with three majority-minority districts. As we have noted. racially polarized voting in Georgia virtually precludes the election of black-supported black candidates in majority-white districts. Based on the evidence before it, the State had every reason to believe that unless it created an additional district in which blacks constituted a majority, bloc voting by whites would preclude minority voters from having any realistic chance to elect an additional representative of their choice and would leave them substantially underrepresented. In those circumstances, the State had a compelling interest in creating three majority-minority districts in an effort to achieve a fair allocation of political power between white and nonwhite voters.

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vote requirement); *United States* v. *Georgia*, Civ. No. 1:90-CV-1749-RCF (N.D. Ga.) (same); *Brooks* v. *State Bd. of Elections*, 848 F. Supp. 1548 (S.D. Ga. 1994) (judicial elections). Following Section 5 objections by the Attorney General, Georgia also was seeking judicial preclearance to expand its at-large judicial election system. *Georgia* v. *Reno*, No. 90-2065 (D.D.C.) (three-judge court). The State was well aware that any concession of racial polarization for redistricting purposes could adversely affect its position in ongoing voting rights litigation.

The district court rejected this interest on the ground that proportional representation is neither a statutory nor a constitutional requirement, and on the ground that "[t]o erect the goal of proportional representation is to erect an implicit quota for black voters." J.S. App. 53a. We agree that proportionality is not a statutory or constitutional requirement. But we disagree that a State's desire to ameliorate the effects of severely racially polarized voting would necessarily constitute a "quota." Where the State attempts to achieve its goal through means that are narrowly tailored, the result is not a "quota" for minority voters, but a fair opportunity for them to elect the candidates of their choice. *Johnson* v. *DeGrandy*, 114 S. Ct. 2647, 2658 n.11 (1994).

B. The State's Plan Is Narrowly Tailored To Further Its Compelling Interests

The State's plan was also narrowly tailored to further its compelling state interests. Relying on *United States* v. *Paradise*, 480 U.S. 149, 171-185 (1987) (plurality opinion), courts have focused on three narrow tailoring requirements in the redistricting context. First, a State may not create more majority-minority districts than either the Voting Rights Act or the State's interest in fairly allocating political power justifies. *Shaw* v. *Hunt*, 861 F. Supp. at 446; J.S. App. 82a. Second, a State may not needlessly pack substantially more minority voters into a district than are reasonably necessary to give the minority group an opportunity to elect the candidate of its choice. *Ibid.* And third, a State may not create an extremely irregular district when a far more regular district would be equally effective in serving the State's compelling interest and the creation of the more compact district would not compromise the State's other legitimate redistricting interests.[22] *Hays* v. *Louisiana*, 839 F. Supp.

[22] The narrow tailoring principle does not require a State to draw the most compact district possible. See Jurisdictional Statement,

1188, 1206-1209 (W.D. La. 1993), vacated on other grounds, 114 S. Ct. 2731 (1994).

The district court did not find that the first and third of those criteria were not satisfied here, and the record would not have supported any such finding. The district court did find, however, that the State's plan was not narrowly tailored because the African-American share of the Eleventh District's population was too high. J.S. App. 63a-87a. According to the district court, "a black candidate in Georgia would have an 'equal' chance of being elected in a district containing 45-50% black registered voters." J.S. App. 86a. As drawn, the district was 64% African-American in total population and 60% African-American in voting age population. J.S. App. 21a n.12. Based on official voter registration data, at the time of the redistricting, the district was estimated to have been 51.1% African-American in registered voters. Joint Exh. 17, at 67.[23] The district court's finding that the proportions were excessive was based on two erroneous legal premises.

First, the district court took the position that the proportionately lower registration and turnout rates of African-American voters should not be figured into the calculation. To consider those factors, the court held, would "amount[] to an incentive for and institutionalization of black voter apathy." J.S. App. 86a. Both this Court and other courts addressing the issue, however, have held that past discrimination and socioeconomic disadvantage may suppress voter turnout and registration among African-Americans. *Gingles*, *supra*, 478 U.S. at 36, n.4 (quoting S. Rep. No. 417, 97th Cong., 2d Sess. 28 (1982)), 38 (lower court found such disadvantage among North Caro-

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United States v. *Vera*, No. 94-988, at 11-14. A State may legitimately give priority to redistricting interests other than compactness, such as protecting incumbents.

[23] There was evidence that, by 1992, 57% of the registered voters in the district were African-American. See Defendants' Joint Exh. 21, at 139.

lina blacks), 69 (expressly endorsing the principle). See also *United States* v. *Dallas County Commission*, 739 F.2d 1529, 1537 (11th Cir. 1984); *United States* v. *Marengo County Commission*, 731 F.2d 1546, 1574 (11th Cir.), appeal dism. and cert. denied, 469 U.S. 976 (1984). Dr. Lichtman testified without contradiction in this case (5 Tr. 206-207) that those factors operate to depress black turnout in Georgia. See Joint Statement of Undisputed Facts, at 40-44. To ignore those factors in creating a majority-minority district would be to give continuing effect to the past discrimination that the State seeks to remedy.

Second, the district court apparently believed that a district cannot be justified as narrowly tailored if a court determines, after thorough litigation of the issue, that the district contains more minority population than the court finds would have been necessary to advance the State's compelling interest. At the time the State creates the district, however, the State must rely on available data, and the State certainly cannot be expected to predict with precision the determination that a court might make on the issue after it has been contested in litigation. The percentage of minority population necessary to give minority voters an opportunity to elect the candidates of their choice in a given district is necessarily a rough calculation, especially at the time of redistricting. The number the State used here—60% black voting age population—was supported by very substantial evidence in this case, see 5 Tr. 205-220, 279-283 (testimony of Allan Lichtman); U.S. Exh. 24, at 20-37, and is well within the range that has been thought appropriate in similar contexts. See, *e.g.*, *Ketchum* v. *Byrne*, 740 F.2d 1398, 1413-1417 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985); *Jeffers* v. *Clinton*, 756 F. Supp. 1195 (E.D. Ark. 1990), aff'd mem., 498 U.S. 1019 (1991). Especially in light of the federal interest in encouraging voluntary compliance with the law, see, *e.g.*, *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 274, 277-278 (1986) (plurality opinion); *id.* at 290-291 (O'Connor, J., con-

curring in part and concurring in the judgment); *id.* at 305 (Marshall, J., dissenting), the State had a more than adequate basis for drawing the Eleventh District with the minority population it contained.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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APPENDIX

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on acount of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Section 5 of the Voting Rights Act, 42 U.S.C. 1973c provides:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to admin-

B. The Eleventh District. Aside from mischaracterizing the legislative process, appellees make a number of equally insupportable claims about the Eleventh District itself. They contend that the district is "shocking" because it "traverses almost the entire State," and "the lines are very difficult if not impossible to follow, even with a road map." Brief of Appellees at 4. The Ninth District *does* in fact cross the entire state, but appellees do not find that "shocking." J.A. 51-52. Undoubtedly, that is because the Ninth District is 95% white.[2]

The factual basis for the claim that the lines of the Eleventh District are "difficult if not impossible to follow" is primarily the testimony of Dr. Timothy O'Rourke. Brief of Appellees at 4. Dr. O'Rourke, a self-described "outsider," T. Vol. III, 107, said that the first time he visited the Eleventh District he got lost in the City of Augusta. That fact was proof that "[i]t's simply difficult to tract these lines." T. Vol. III, 109. However, even Dr. O'Rourke conceded that because he got lost in Augusta was not a good reason for invalidating the state's congressional redistricting plan. T. Vol. III, 203.

Those who, unlike Dr. O'Rourke, have lived or campaigned in the Eleventh District have no difficulty in following the district's lines. Brooks, T. Vol. IV, 247 ("I don't have any trouble finding my way around"). According to former state senator and state labor commissioner Albert Scott, the most difficult congressional district in which to

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[2]Appellees deny that race was a significant factor in the construction of the Ninth District, Brief of Appellees at 11 n.9, despite the fact that the evidence that race was a significant factor is uncontroverted. The state's demographer admitted that the residents "are predominantly of an Anglo-Saxon bloodline," and the district was "drawn purposefully to maintain it as one district, a[n] area that has a distinct culture and heritage." Meggers, Tr. Prelim. Injun. 126-27.

campaign was the Ninth. The mountain terrain "slows down your travel," and media markets "end up touching North Carolina and Tennessee. It's a very difficult place." T. Vol. VI, 88. Appellees do not claim that the Ninth is constitutionally suspect because it's difficult to campaign there. Again, that is undoubtedly because the district is 95% white.[3]

Appellees argue that Georgia has "a long history of reasonably compact districts, with common economic interests" being the primary traditional redistricting principle, which the 1992 plan ignored. Brief of Appellees at 11. According to appellees, one district is a "poultry" district, another is a "military" district, another is a "carpet" district, another "agricultural," and so on. *Id.* Such an analysis is simplistic and wrong on the facts. Compactness has never been a concern of the legislature, and there is such a broad range of economic interests across the state that it is not possible to arrange congressional districts in neat, self-contained economic units.

Albert Scott testified that during the time he was in the legislature in 1980 the driving criteria in redistricting were "the protection of incumbents [including members of

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[3]The racial squint of appellees' argument is abundantly clear. They are not concerned when race is taken into account in the construction of majority-white districts that insure the election of white candidates. It is only when blacks are provided equal electoral opportunities that they complain about being "brick[s] on the highway of electoral busing." Brief of Appellees at 29. What appellees want is a bleached Eleventh District in which a white can win. They say as much in their brief: "Plaintiff DeLoach, lost the 1992 democratic congressional runoff election to the current representative in the Eleventh, and desires to run again without the outcome being predetermined on the basis of race." *Id.* at 29 n.28. But as Rep. Hanner and the 15 other whites elected to the state legislature from majority-black districts prove, the outcome of an election in a majority-black district is not "predetermined on the basis of race." J.A. 26-27.

Congress], and where possible, to avoid electing Republicans." T. Vol. VI, 69-70. As for compactness, he "always felt that the funniest looking district, Congressional district, I've ever seen was the Eighth Congressional District after the 1980 census . . . because it actually stretched from Florida all the way to what I refer to then as the suburbs of Atlanta." *Id.* at 70. The reapportionment staff considered shape, but "I do not believe that members of [the] legislature cared anything about shape . . . . We had elongated districts that stretched close to 300 miles in duration. And that was never a consideration." Scott, T. Vol. VI, 73.

Appellees claim that the appearance of the Eleventh District is not "normal" and cite as proof of that proposition the fact that the district was described in the press as a "crazy quilt," "grotesque," etc. Brief of Appellees at 3 & n.4. Apart from the media being a questionable source of constitutional standards, prior congressional districts in Georgia have been described in similar terms and no one has contended that for that reason they were constitutionally suspect. Meggers, T. Vol. II, 261 (the shape of "[t]he Eighth has consistently been criticized" and "there were general complaints about the Fifth in shape").

In truth, it takes no imagination to dream up a pejorative label for a district. The Fourth District in Massachusetts has been described as being shaped like a "saxophone." CONGRESSIONAL QUARTERLY'S POLITICS IN AMERICA 1994: THE 103RD CONGRESS 726 (P. Duncan ed. 1994). Oregon's Fifth District has been described as being shaped like "the state fish." *Id.* at 1277. Indeed, even Polonius, that most literal minded and unimaginative of men, was able to see -- with some help from Hamlet -- camels, whales, and even weasels in the clouds passing overhead. *Hamlet*, Act III, Scene II. Appellees' repeated descriptions of the Eleventh as having a "hook" or a "tail" or

looking like a "snake" may be part of a tradition of political or media drollery, but they should not be confused with constitutional analysis.

Despite appellees' contention, there is no such thing as a single "military" district in Georgia. Scott testified that "in the majority of the congressional districts [there] was a large military presence." Scott, T. Vol. VI, 74. For example:

> in the Eighth, you had Warner Robins; and then if you go to the Second, you had a Marine Depot in Albany, and you had a Marine Air Station in Valdosta. And if you went over and looked at the First, you had Fort Stewart and then you had Hunter Army Airfield and Hinesville and here in Savannah, you had those two military installations. You had a large military installation in the Tenth. You had military installations back then in the Sixth . . . . Even if you went north, I think it looks like the Seventh where you had Cobb County, you had Lockheed and an Air Force facility there, and a major defense contractor.

Id.

There is also no such thing as a single agricultural congressional district in Georgia. Instead, several districts -- the First, Second, Third, and Eighth -- have strong agricultural economies. Scott, T. Vol. VI, 75.

In arguing that the Eleventh is dysfunctional, appellees point to the fact that the district contains both urban and rural areas. But such a mix is inevitable, given the large rural areas of the state, and has always characterized redistricting in Georgia. Appellees' expert Dr. O'Rourke agreed that it was "impossible" to draw congressional districts in Georgia which did not include urban and rural areas. T. Vol. III, 190. And as Scott testified concerning the 1980 plan, "the Second is a good

example of where you had large urban centers, but yet you had a vast area of farm communities. So you had quite a diversity in the districts then." T. Vol. VI, 73-74.

The appellees' contention that the Eleventh "is nothing but an amalgam of distantly located concentrations of black population located at the end of racially gerrymandered appendages" is likewise a gross distortion that has no basis in the record in this case. Brief of Appellees at 6. According to Scott, there is a strong industrial base throughout the Eleventh District:

> You have some very large manufacturing facilities in Savannah in the district. I happen to be employed at one. One of the other ones is Stone Container here.
>
> You have a tremendous amount of kaolin that's processed right here on the Savannah River, in Savannah . . . . All the kaolin is, of course, mined in the middle portion of the Eleventh, and then in turn shipped either by -- mainly by rail to the ports of Savannah, and processed and prepared for shipment throughout the world.
>
> In addition to that, . . . [y]ou've got an industrial base now in Effingham. You've got Fort Howard which is a large manufacturing facility, and . . . in Burke [County] . . . [y]ou've got . . . a large industrial facility there in the presence of a large nuclear power plant that's owned by Georgia Power Company, which owns Savannah Electric and Power, which supply electricity throughout this entire region.
>
> Richmond County has a large industrial base. You've got two large paper manufacturing facilities there; Federal Board and Paper, and you have Augusta News Print, which primarily manufactures news press from recycled paper.

> So you have a large industrial base -- and chemical manufacturing as well in Augusta.
>
> And then you move on up to Dekalb and in that area of the district, you've got some manufacturing there . . . of light fixtures and florescent lights.
>
> And when you look in the middle of the district, when I look at the Baldwin County and in that area, and Putnam . . . you've got manufacturing there. You've got a lot of garment plants there.
>
> You have a lot [of] your manufactured housing come out of the Eleventh Congressional District. In Putnam, for instance, there's one of the largest manufacturers in this part of the country located in that Eleventh Congressional District. So you do have a heavy industrial base.
>
> The other thing that you have is a heavy employment of people who are in the retail trade employment, and then you have a service . . . [based economy], and that's throughout.

Scott, T. Vol. VI, 82-83.

Appellees attack the Eleventh District because it splits eight counties. Splitting counties, however, was far from sacrosanct in prior congressional redistricting. In 1980 when "the congressman from the Ninth did not want all of Gwinnette [*sic*] County in his district, all of that [respect for counties] went out the window, and Gwinnette [*sic*] County was split." Scott, T. Vol. VI, 71. When former Congressman Elliott Levitas "wanted to increase what he perceived as Democratic voters in his district, the county of Dekalb was split." *Id.* Counties were split in districts other than the Eleventh in the 1992 plan as well, including all five of the counties in the Sixth District currently represented by Newt Gingrich. Garner, T. Vol. III, 229.

Relying on the testimony of Dr. O'Rourke, the court found there "are no tangible 'communities of interest' spanning the hundreds of miles of the Eleventh District." J.S. App. 81. Yet, Dr. O'Rourke testified that "communities of interest" are very subjective and that preserving them in redistricting is difficult because "they are very hard to interpret." T. Vol. III, 188-89. More to the point, he conceded that there is "a pattern of similarity" of residents throughout the district based upon socio-economic indicators such as poverty and education. T. Vol. III, 191-92.

Another distinctive feature of the Eleventh District is a history shared by both blacks and whites in that part of the state of generally being overlooked by elected representatives. Wilde, T. Vol. IV, 79-80; Chambers, T. Vol. VI, 117; Darling, T. Vol. VI, 150. The district now provides responsive representation for all residents. Wilde, T. Vol. IV, 80; Abrams, T. Vol. VI, 56, 59-60; Chambers, T. Vol. VI, 117. The Eleventh also reflects familial ties between rural and urban residents, Brooks, T. Vol. IV, 241, as well as ties between farmers, like appellant Abrams, and the transportation hubs necessary to export their farm products. Abrams, T. Vol. VI, 54-56.

The area encompassed by the Eleventh District also shares historical ties. Savannah was once the colonial capital of Georgia, and both Milledgeville in Baldwin County and Augusta in Richmond County served later as the state's capital. T. Vol. VI, 88. Appellees' claim that the Eleventh is "nothing but an amalgam of distantly located concentrations of black population" is belied by the record.

III. Appellees (and the Court Below) Improperly Seek to Review the Attorney General's Section 5 Determinations

Appellees (and the court below) assert that the Georgia legislature enacted the 1992 plan because of a

meritless Section 5 objection by the Attorney General to earlier plans. They attack both the correctness and the *bona fides* of the objection, and argue that it does not provide a basis for the adoption of the challenged plan. This Court should reject this argument, for it rests upon the sort of judicial review of the Attorney General's exercise of authority under the Voting Rights Act that the Court has explicitly held to be outside the jurisdiction of a local federal court.

In *Morris v. Gressette*, 432 U.S. 491, 506 n.24 (1977), the Court held that no matter how erroneous the Attorney General's decision not to interpose an objection to a voting change might be, minority citizens could not bring a civil action to challenge it. In *Morris*, moreover, the Attorney General's failure to object had been based upon a misinterpretation of law later clarified by this Court. 432 U.S. at 497 & n.8.

In responding to the dissent's suggestion that an Attorney General might trade preclearance for the promise of electoral college votes, Justice Powell's majority opinion anticipated and rejected the sorts of emotion-laden charges made by appellees about the motivations and actions of the Attorney General in this case. The majority held that there could be no review of the Attorney General's decisions respecting preclearance because "Congress like the courts operates on the assumption that the Attorney General of the United States will perform faithfully his statutory responsibilities." 432 U.S. at 506 n.23. Justice Powell also rejected even limited review of the Attorney General's exercise of Section 5 authority similar to that suggested by the United States in this case (*see* Brief at 30-31):

> [It was argued] that there should be limited judicial review only when the Attorney General improperly relinquishes his responsibilities to evaluate independently the submitted legislation in light of the

> standards established by Section 5 . . . . For the reasons stated in text, we think *Congress intended to preclude all judicial review of the Attorney General's exercise of discretion or failure to act.*

432 U.S. at 506 n.24 (emphasis added).

Morris recognized, of course, that the Attorney General's interpretation of the Voting Rights Act is not binding upon the courts in cases *within their jurisdiction*. 432 U.S. at 505. *Accord Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 831 (1992) (local three-judge court may determine Section 5 coverage independent of the Attorney General). It noted that under the Act, states were free to seek a declaratory judgment from a three-judge court in the District of Columbia even after an objection from the Attorney General. *Morris*, 432 U.S. at 505 n.21. In such an action, of course, the issue is heard *de novo* and decided on the basis of the evidence presented to the court -- not upon an administrative record. The judgment of the D.C. court represents an independent legal adjudication, rather than a review of the Attorney General's action. *See* 432 U.S. at 506-07.

Even where the Attorney General has precleared a voting change, voters who are aggrieved can still bring an action under Section 2 of the Voting Rights Act. 42 U.S.C. § 1973. Again, in such an action the issue is not the correctness of the Attorney General's decision but the validity or invalidity of the challenged electoral practice. *See, e.g., Thornburg v. Gingles*.

The approach taken by the lower court in this case renders Section 5 unwieldy and ineffective. Consistent with *Morris*, the court should have pretermitted any inquiry into the circumstances surrounding the Attorney General's objections and should have recognized that they provided a "strong basis in evidence" for the adoption of the 1992 plan. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989).

In castigating the Department of Justice for objecting to the state's first and second submissions, the appellees also make the erroneous assumption that the DOJ has the burden of proving a Section 5 violation. Brief of Appellees at 19 n.19 ("the DOJ presented absolutely no evidence at trial" of purposeful discrimination). A covered jurisdiction, not the DOJ, has the burden of showing that a proposed voting change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color," or membership in a language minority. 42 U.S.C. § 1973c. The allocation of the burden of proof to the submitting jurisdiction was a critical and innovative feature of Section 5 designed to "to shift the advantage of time and inertia from the perpetrators of the evil [of discrimination in voting] to its victims." *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

This Court has consistently sustained this burden shifting and held that Section 5 creates a legal "presumption" that a proposed voting change is discriminatory. *McCain v. Lybrand*, 465 U.S. 236, 245 (1984). Any "ambiguities" in the preclearance process are to be resolved against the submitting jurisdiction. *Id.* at 257. According to the Court, "[t]he preclearance process is by design a stringent one . . . the burden of proof (the risk of nonpersuasion) is placed upon the covered jurisdiction." *Id.* Not surprisingly, many Section 5 submissions have turned on the failure of the jurisdiction to carry its burden of proof, rather than on a positive finding of discrimination by the courts or the Attorney General. *See, e.g., City of Rome v. United States*, 446 U.S. 156, 187 (1980).

IV. Appellees Lack Standing

Appellees contend that *Shaw v. Reno*, 113 S. Ct. 2816 (1993), revolutionized this Court's standing jurisprudence, eliminating the requirement of concrete individualized harm articulated in cases such as *Lujan v. Defenders of Wildlife*,

112 S. Ct. 2130, 2136 (1992), and *Northeastern Florida Contractors v. Jacksonville*, 113 S. Ct. 2297 (1993), decided the same term as *Shaw*. Brief of Appellees at 26. Appellees take this position in light of the district court's determination that "the plaintiffs suffered no individual harm; the 1992 congressional redistricting plans had no adverse consequences for these white voters," J.S. App. 31, as well as its legal conclusion that *Shaw* "liberalizes the standing requirement." *Id.* at 33.

While *Shaw* recognized that white voters could state a *claim* challenging congressional redistricting plans under the Equal Protection Clause, it did not exempt those claims from routine Article III standing requirements. In their assertion that *Shaw* creates standing, the district court majority and appellees blur the distinction between standing and cause of action or claim, making the same mistake as the court of appeals reversed in *Davis v. Passman*, 422 U.S. 228, 239 n.18 (1979). In *Davis*, this Court articulated the distinction between a cause of action, which is a necessary element of a "claim," 422 U.S. at 239, and standing. To state a cause of action a plaintiff must be "a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court." *Davis*, 442 U.S. at 239 n.18. However, to have standing, a plaintiff must satisfy the additional requirement of being "sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal-court jurisdiction." *Id.* Concrete and particularized injury is the hallmark of this adverseness. Thus, under *Davis* it is clear that the class of persons able to state a cause of action is broader than those who would actually have sufficient standing to vindicate their claims.

In accordance with *Davis*, *Shaw* suggests that white voters, such as appellees, are in the class of litigants that may properly invoke the power of the court to enforce the

equal protection guarantee in the redistricting context. But *Shaw* does not resolve the issue of whether these particular white voters in Georgia's Eleventh District have sufficient injury so as to be sufficiently adverse.

At each successive stage of the litigation, plaintiffs bear the relevant burden of proof on standing. *Lujan*, 112 S. Ct. at 2136. On a motion to dismiss, as in *Shaw*, general factual allegations of injury are sufficient. *Id.* at 2137. However, at trial, standing, if controverted, must be "supported adequately by the evidence adduced at trial." *Id.* (citation omitted). That the *Shaw* plaintiffs were able to survive a motion to dismiss does not support the district court's determination here that *Shaw* provides standing for these plaintiffs at the trial stage, and after they have been found to have suffered "no individual harm," J.S. App. 31.

In support of standing, the only injury appellees point to is that of the sole plaintiff to testify at trial, Henry Zittrouer, that he lived in a different congressional district than his son and cousins, that he was not in a coastal district, that he lived in a land bridge and was not in the same congressional district as all other residents in his county, and that "the power structure from Dekalb will decide who will win elections." Brief of Appellees at 29; T. Vol. V, 27-28. Residing in a different congressional district than one's family members as well as the other "injuries" cited by Mr. Zittrouer do not rise to the level of constitutional injuries or sufficient adverseness to create an Article III case or controversy. If they did, any redistricting plan would be subject to challenge by any citizen at any time and virtually for any reason.[4]

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[4]Appellees assert that the 1992 plan has had the effect of destroying "existing biracial coalitions" in Georgia. Brief of Appellees at 46. There is no evidence in the record to support such a claim. To the contrary, the evidence, while admittedly limited, suggests that the creation of

Plaintiff Zittrouer's more salient testimony was that the shape of the district was the result of the influence of his own state representative, Ann Purcell, to keep as much of Effingham County as possible out of the Eleventh District, T. Vol. V, 34-35, and that since he had never attempted to contact his member of Congress, he found his representative neither responsive nor unresponsive. T. Vol. V, 30.

Appellees suggest that requiring white voters to show individual injury is tantamount to eliminating the cause of action recognized in *Shaw*. Brief of Appellees at 26-27. That is not so. As demonstrated by the cases relied on by appellees, this Court's equal protection analysis has consistently been dependent upon showings of concrete particularized harm by those bringing the challenges. For example, in *Loving v. Virginia*, 388 U.S. 1 (1967), the plaintiffs were a biracial married couple indicted for violating Virginia's miscegenation statute; in *City of Richmond v. J.A. Croson Co.*, the white plaintiff company lost a city contract; in *Wygant v. Jackson Board of Education*, 476 U.S. 276 (1986), white teachers with more seniority were

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majority black districts has encouraged the formation of biracial coalitions and has dampened racial bloc voting. For example, the Second and Eleventh Districts became majority black for the first time in 1992. From 1984 to 1990, only 1% of white voters in the precincts now within the Second District voted for minority candidates in statewide elections. The corresponding white vote for minority candidates in the Eleventh District was only 4%. A dramatic increase in white voting for minority candidates occurred in 1992. Twenty-nine percent of white voters in the Second District and 37% of white voters in the Eleventh District voted for minority candidates in statewide elections in 1992. DOJ Ex. 24, Tables 1-3. There was an equally dramatic increase in white cross-over voting in Mississippi after the creation of a majority-black congressional district. In the 1986 election Mike Espy got just 10% of the white vote and 52% of the vote overall. In 1988 he won re-election with 40% of the white vote and 66% of the vote overall. Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1278 n.166 (1989).

laid off in favor of less senior minority teachers; in *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978), the white applicant was not able to compete for all medical school positions; in *Northeastern Florida Contractors v. Jacksonville*, white contractors could not compete for all city contracts; in *Heckler v. Mathews*, 465 U.S. 728 (1984), the plaintiff was denied Social Security benefits. These cases demonstrate the kind of concrete harm sufficient under this Court's jurisprudence to establish standing.[5]

Appellees ask the rhetorical question, "[i]f a citizen and registered voter in a gerrymandering [sic] congressional district cannot complain of the constitutional violation enunciated in *Shaw*, who can?" Brief of Appellees at 29. The answer is "a person who has been injured." Individuals would be injured, for example, if they had been denied the right to vote because of their race, *Smith v. Allwright*, 321 U.S. 649 (1944); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), or if their voting strength had been diluted, *Thornburg v. Gingles*. But, as the district court found in this case,

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[5]The remaining cases relied on by appellees also show individualized harm to the persons initiating the equal protection action: *Brown v. Board of Education*, 347 U.S. 483 (1954) (black school children denied admission to white schools); *Hernandez v. New York*, 500 U.S. 352 (1991) (Latino criminal defendant tried by a jury with no Latinos due to use of peremptory strikes to eliminate all Latinos); *Batson v. Kentucky*, 476 U.S. 79 (1986) (black criminal defendant tried by a jury with no blacks due to use of peremptory strikes to eliminate all blacks); *Palmer v. Thompson*, 403 U.S. 217 (1971) (blacks lost their public swimming pool as city closed segregated black and white pools); *Evans v. Abney*, 396 U.S. 435 (1970) (blacks denied access to public park due to reversion of trust land back to white heirs -- court found no equal protection violation); *Gayle v. Browder*, 352 U.S. 903 (1956) (blacks forced to comply with bus segregation laws or arrested and fined for violation); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (blacks denied access to white only bath houses and bathing facilities); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (blacks denied access to Bobby Jones Golf Course).

appellees have failed to prove that they were harmed. J.S. App. 31; Brief of Appellants at 38-40. There is no basis for relieving white voters challenging redistricting plans from requirements applied to all other plaintiffs bringing equal protection challenges.

Conclusion

For the above reasons, the decision of the court below should be reversed.

Respectfully submitted,

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